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EDISE, IDAHO

BEFORE THE STATE BOARD OF LAND COMMISSIONERS

SHARLIE-GROUSE NEIGHBORHOOD ASSOCIATION, INC., Petitioners,) MEMORANDUM IN OPPOSITION TO SGNA'S MOTION FOR SUMMARY JUDGMENT
vs. IDAHO STATE BOARD OF LAND COMMISSIONERS,	(Intervenor/Respondents, Payette) Lakes Cottage Sites Owners) Association, Inc. and Wagon Wheel) Bay Dock Association, Inc.)
Respondent,))
and)) >
PAYETTE LAKES COTTAGE SITES OWNERS ASSOCIATION, INC., an Idaho non-profit corporation, and WAGON WHEEL BAY DOCK ASSOCIATION, INC., an Idaho non- profit corporation,)))))
Intervenor/Respondents.	,))

COME NOW, Intervenor/Respondents, Payette Lakes Cottage Sites Owners Association, Inc. ("PLCSOA") and Wagon Wheel Bay Dock Association, Inc. ("WWBDA"), by and through their attorneys, Mark D. Perison, P.A., and submit their Memorandum in Opposition to SGNA's Motion for Summary Judgment.

I. <u>INTRODUCTION</u>

PLCSOA and WWBDA hereby adopt and incorporate the Memorandum in Opposition to SGNA's Motion for Summary Judgment filed by the State Board of Land Commissioners ("Land Board"), as well as the supporting Affidavit of Steven W. Strack, and all exhibits attached thereto. In addition, PLCSOA and WWBDA offer the argument below in opposition to SGNA's Motion for Summary Judgment.

In its Motion for Summary Judgment, Sharlie-Grouse Neighborhood Association, Inc. ("SGNA") requests a declaratory ruling that the Land Board violated the Idaho Constitution by conveying certain roads and common areas to PLCSOA, and that the two quitclaim deeds ("Deeds") so conveying are therefore invalid.

PLCSOA and WWBDA have filed their own Motion for Summary Judgment, in which they adopted the Land Board's Motion and Memorandum for Summary Judgment, and supporting Affidavit of Joy M. Vega, as well as offered their own argument regarding the reasons that SGNA's Petition should be summarily dismissed. In order to avoid repeating the very same arguments offered in support of their own Motion for Summary Judgment, PLCSOA and WWBDA hereby incorporate by reference their Memorandum in Support of Motion for Summary Judgment, and

supporting Affidavits of Tricia K. Soper, Kevin Hanigan, Andrew Connolly, Mike Riddle, and Laurie McNamara, all filed on April 15, 2019.

This Memorandum in Opposition is also supported by the (Second) Affidavit of Andrew Connolly. A Motion to Strike certain Declarations offered by SGNA is filed contemporaneously herewith.

II. ARGUMENT

In its Opening Brief, SGNA seems to be arguing that because a constitutional violation is alleged, subject matter jurisdiction is irrelevant, the authority of this tribunal should be vastly enlarged from that which is granted statutorily, and standing should not be considered. However, SGNA simply cannot overcome each of these hurdles to reach the merits of its Petition.

The Land Board has addressed SGNA's lack of subject matter jurisdiction, the limitations of the Land Board's authority in the context of a declaratory ruling, and the exclusivity of SGNA's remedy in seeking judicial review within twenty-eight days of the final agency action, as well as the merits of SGNA's Petition. Therefore, these arguments will not be repeated here. Instead, PLCSOA and WWBDA will address SGNA's arguments regarding standing.

A. SGNA Lacks Standing to Seek its Requested Relief.

SGNA spends the vast majority of its Opening Brief in an exhaustive discussion of standing, arguing that standing is not required in an administrative proceeding, or that standing has been waived or met. This issue is closely related to

the issue of subject matter jurisdiction and agency authority, and the issues overlap; however the analysis is not as complicated as set out by SGNA.

SGNA is not just seeking a ruling as to the applicability of statutes or rules administered by the agency as allowed by Idaho Code § 67-5232. Instead, it is asking the Hearing Officer to retroactively determine that the Land Board's final action six years ago violated constitutional provisions. SGNA asks further that the Deeds be declared invalid. Therefore, even if a formal standing analysis does not need to be applied in an administrative proceeding, surely there is a fundamental premise that whenever a party asks any tribunal for relief, there must be some basis for that party to appear in the tribunal in the first place, coupled with some ability of the tribunal to grant the requested relief. Whether that basis to request relief is reviewed in the context of subject matter jurisdiction, the statutory authority of the agency, or via a standing analysis, this Hearing Officer must first evaluate whether there is a basis at all to even consider SGNA's request.

1. The "Any Person" Language of Section 67-5232 is Not as Broad as SGNA Argues.

SGNA relies on the language in Idaho Code § 67-5232, which allows "any person" to seek a declaratory ruling as to the *applicability* of any statute or rule administered by the agency. SGNA contends that the language, "any person," is all that is necessary to confer SGNA standing in this tribunal, in which SGNA is requesting that the Land Board invalidate the Deeds previously executed by the Land Board.

However, under SGNA's expansive argument, any random person, at any point in time, for any purpose, could seek a retroactive declaratory ruling on any matter, even a final agency action that occurred years earlier. This cannot possibly be the correct result, and would lead to absurd results.

Moreover, the ability to seek a declaratory ruling as to the applicability of a statute or rule does not then translate into the ability of "any person" to seek affirmative action by an agency to invalidate its own final action taken six years prior, or to void Deeds previously conveyed as a result of that final action. As previously argued by the Land Board, any right that SGNA may have once had to seek judicial review of a final agency action, *i.e.* the approval of the conveyance of the roads and common areas to PLCSOA, has long since passed. Land Board's MSJ and Supp. Memo. pp. 10-15.

By SGNA's reasoning, no administrative action would ever actually be final, if "any person," at any time, for any reason, can challenge any final agency action by seeking, retroactively, and even years later, a declaratory ruling that the agency violated a constitutional provision. That result is not contemplated by Section 67-5232, and no caselaw has been cited by SGNA that would grant such expansive authority to this tribunal.

SGNA's "any person" argument fails because the relief sought vastly exceeds that which an agency is allowed to address via declaratory ruling. This tribunal

cannot grant the remedy sought by SGNA, and SGNA's Motion for Summary Judgment should be denied.

2. SGNA's Supposed "Injury" is Not Redressable by the Land Board.

SGNA has correctly set forth the requirements for standing: 1) a particularized injury; 2) causation; and 3) redressability. State v. Philip Morris, 158 Idaho 874, 881, 354 P.3d 187, 194 (2015). SGNA lacks each of these requirements. SGNA's supposed injury stems not from the action complained of (i.e. conveyance of the roads and common areas to PLCSOA), but to the installation, years later, of WWBDA's community dock. Even if the injury (i.e. the dock) was deemed fairly traceable to the Land Board's actions, the Land Board cannot grant the relief sought here.

a. SGNA Does Not Have an "Injury" That is Fairly Traceable to the Conveyance of the Roads and Common Areas to PLCSOA.

As argued in PLCSOA/WWBDA's Memorandum in Support of Motion for Summary Judgment, the standing analysis requires the petitioning party to have a "distinct and palpable injury" that is "fairly traceable" to the challenged conduct. Young v. City of Ketchum, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2001). Whereas SGNA ostensibly complains that the conveyance of Community Beach is the "injury," all of its supporting Declarations instead address the allegedly negative effects stemming from WWBDA's community dock.

PLCSOA and WWBDA have moved to strike SGNA's supporting Declarations as irrelevant to show an "injury" in the context of the standing analysis for which

they are offered. The Declarations of Mark Richey, Christopher A. Mothorpe, Ph.D., and Zephaniah Johnson each set forth the opinion that SGNA members' property values have declined due to the existence of WWBDA's dock. The Declarations do not address any negative effects due to the conveyance of the roads and common areas themselves. *See* Motion to Strike.

The evidence that SGNA and/or its members were not actually "injured" by the conveyance of the roads and common areas, is the simple fact that while SGNA has tried various means over the years to either prevent WWBDA from installing its dock, or to require WWBDA to remove the dock, its legal activities did not begin until WWBDA sought to install its community dock. What the timing of this contentious litigation shows, is that SGNA perceives, and has always perceived, its "injury" to be the dock, rather than the conveyance of the roads and common areas to PLCSOA, which occurred years prior.

As an illustration, let's assume for a moment that the Land Board had conveyed the property to PLCSOA in 2014, but that PLCSOA did not lease its littoral rights and allow a community dock to be installed until 10 years later. Would it be appropriate for the Land Board at that time to entertain SGNA's belated request due to the perceived negative effects of WWBDA's dock? How about 20 years later? Following SGNA's argument, no amount of time passing would preclude it from bringing its Petition seeking to invalidate the Deeds.

SGNA did not complain about the conveyance itself for nearly five years after the Land Board voted to convey the roads and common areas, and four years after the first Deed was issued. SGNA's legal efforts did not begin until WWBDA sought to install its community dock. Looking at it from this perspective makes it crystal clear that the injury complained of is the community dock, not the conveyance of Community Beach itself.

SGNA will likely try to argue that without the conveyance in the first place, there could have been no community dock. However, this is not true. Idaho Department of Lands ("IDL") has granted encroachment permits to several dock associations for community docks attached to common areas within the Southwest Payette Cottage Sites Subdivision ("Subdivision") boundaries over the years, even when those common areas were owned by the State. (Second) Connolly Aff., ¶¶ 5-10. Therefore, even if it were determined that the Deeds are invalid, and ownership of the roads and common areas was ultimately revested in the State, the State would simply continue to manage the encroachment permits granted to private dock associations as it has done for decades.

Indeed, a public hearing was held when WWBDA first sought its encroachment permit from IDL. IDL heard objections from the SGNA members as to the perceived impacts of a community dock on their properties. IDL still granted the permit, and the granting of that permit was upheld after SGNA members sought judicial review. Soper Aff., Exh. "A," (Judge Scott's Opinion on Appeal). There is no

reason to believe that IDL would have acted any differently in granting the permit whether Community Beach was still owned by the State or not, given that these permits have been granted to private dock associations for decades. (Second) Connolly Aff., ¶¶ 5-10.

b. SGNA's "Injury" Cannot be Redressed by the Land Board.

Because Section 67-5232 limits the Land Board's authority, the redressability analysis is inextricably intertwined with the analysis regarding this tribunal's statutory authority.

In its Opening Brief, SGNA states:

SGNA seeks a ruling on whether and to what effect Idaho statutes governing the requirements for the sale of trust lands apply to the conveyance of Community Beach. In other words, what is their applicability? That brings this matter within section 67-5232.

SGNA's Opening Brief, p. 21.

This statement is curious, given the fact that the word "applicability" does not appear anywhere in SGNA's Petition. In its Petition, SGNA asks for a number of rulings, not one of which is the "applicability" of Idaho statutes. Indeed, the expansive scope of SGNA's request is clear from its own Petition, which seeks a declaratory ruling of the following:

- a. The conveyance of the State Lands set forth in the Deed and Amended Deed constituted the disposal or disposition of state endowment lands.
- b. The disposal or disposition of state endowment lands required the Board to employ a public auction process.
- c. Idaho law sets forth in clear terms the procedural requirements for the disposal of state lands by public auction.

- d. There was no exemption from, or exception to, the public auction requirement, statutory or otherwise, that applied to the State Lands, including the SGN Property.¹
- e. The Board failed to abide by the statutes and laws governing the disposition of state lands when it conveyed the State Lands to PLCSOA.
- f. The Board had no authority or jurisdiction to dispose of the State Lands without a public auction.
- g. Because the Board lacked authority and jurisdiction to convey the State Lands without a public auction, the Deed and Amended Deed are void and without effect.
- h. Because the Deed and Amended Deed are void and without effect, the Board continues to hold title to the State Lands, and may commence with a public auction thereof in accordance with the requirements of state law.

Petition for Declaratory Ruling, pp. 7-8.

In not one of these listed items has SGNA requested the only relief available to it, which is a declaration as to the "applicability" of a <u>statute</u> or <u>rule</u> administered by the agency. For instance, SGNA did not seek a declaratory ruling as to whether Idaho Code §§ 58-313 or 58-317 are applicable to the conveyance of roads and common areas by the Land Board to PLCSOA. Rather, SGNA has asked the Land Board to retroactively declare its own final action, many years later, <u>unconstitutional</u>, and to further declare that the Deeds themselves are void and without effect.

In order to finesse the redressability arguments, SGNA sets forth assumptions and presumptions. For instance, SGNA states:

Redressability is also likely. If a declaratory order is issued to the effect that the sale of Community Beach without an auction violates law, it is fair to assume that something will come of that.

¹ SGNA refers to Community Beach and the surrounding roads as "SGN Property." This is a misnomer, as all property is owned by PLCSOA.

SGNA's Opening Brief, p. 40 (emphasis added). SGNA goes on to state:

Surely we can presume that if a constitutional violation is found, the Land Board, acting through the Attorney General will take appropriate steps to redress the error consistent with its sacred trust duties. In other words, if it is determined that the Land Board's action was unconstitutional and the Quitclaim Deeds are void, there is a substantial likelihood that the State of Idaho will not stand idly but will take action to remedy the situation. In any event, it is likely that SGNA would be in a good position to compel such result.

Id. at p. 42 (emphasis added).

SGNA appears to now acknowledge that even if the Hearing Officer were to issue a declaratory ruling that the Deeds were invalid, that something else is required—i.e. "something will come of that." This is different than SGNA's Petition, in which it appears that SGNA assumed that a declaratory ruling could be sought to both declare the Deeds invalid and actually revest the roads and common areas in the State. Petition, p. 8, ¶¶ g-h.

However, as the Land Board points out, SGNA has essentially conceded that a declaratory ruling in this context would be nothing but an academic exercise. Land Board's Memo. Opp., p. 11. What is the point of the Hearing Officer considering a retroactive request for a declaratory ruling if something else has to be done to obtain the results SGNA seeks?

Another problem faced by SGNA is that Section 67-5232 does not authorize an agency to issue a declaratory ruling regarding the applicability to a <u>constitutional</u> <u>provision</u>. SGNA glosses over this problem in a footnote, arguing essentially that statutes and the constitution should be treated the same. SGNA's Opening Brief, p.

21, n. 16. However, if the legislature had intended to allow agencies to rule on the applicability of constitutional provisions, rather than simply statutes or rules, it would have said so. *Mayer v. TPC Holdings, Inc*, 160 Idaho 223, 227, 370 P.3d 738, 742 (2016) (holding that unless the law is ambiguous, it should be followed as written); *Glaze v. Deffenbaugh*, 144 Idaho 829, 832, 172 P.3d 1104, 1107, (2007) (the legislature "means what it says unless the result is "'palpably absurd.'"). The words "statutes" and "rules" are unambiguous. The Land Board is simply not authorized to broaden its own authority by determining the applicability of constitutional provisions.

Further, SGNA has not cited any authority that would give it the authority to compel the Land Board to auction off little "enclaves" of land, even if the roads and common areas were ultimately revested in the State. To the contrary, the Land Board has the explicit statutory authority both to determine how it apportions parcels of land for sale, and to cause state lands to be laid out in less than legal subdivisions, if those parcels or subdivisions would garner a higher sale price or serve the public's convenience. I.C. §§ 58-313 and 58-317. Therefore, even if this tribunal had the authority to void the Deeds, and ownership of the roads and common areas was ultimately revested in the State, it would not remedy SGNA's "injury," that is, the inconvenience that the community dock poses to its membership. Without any ability to "compel such a result," this matter is utterly un-redressable and the Hearing Officer should not entertain SGNA's requests.

WWBDA obtained its dock permit from IDL in 2018. The other four dock associations have obtained encroachment permits from the Idaho Department of Lands years and years ago, with one of the dock associations receiving its encroachment permit in 1997. With the exception of WWBDA, these encroachment permits were granted by IDL when all of the common areas were still owned by the State. (Second) Connolly Aff., ¶¶ 5-10. IDL's willingness to grant encroachment permits to private dock associations for community docks on common areas began long ago. There is absolutely no indication that even if the Deeds were deemed void, and the common areas revested in the State, that IDL would suddenly rescind these long-standing encroachment permits and disallow private community docks on the common areas. Indeed, IDL would be breaching the encroachment permits if it did so, which would undoubtedly invite lawsuits from the dock associations.

Therefore, the only remedy that SGNA truly seeks, *i.e.* removal of WWBDA's dock, will not happen, regardless of the outcome here. Unfortunately for SGNA, the Land Board is not a court of law. Its jurisdiction is constrained by statute. It does not have the authority to declare a constitution violation, invalidate its own past actions or undo Deeds previously conveyed. Even if it could invalidate the Deeds, WWBDA would still have an encroachment permit from IDL and its community dock would remain. Because there is no remedy that will redress SGNA's "injury," SGNA's Motion should be denied and its Petition dismissed for lack of standing.

B. SGNA Once Requested the Very Conveyance of Which it Now Complains.

This issue was touched upon in PLCSOA/WWBDA's Memorandum, but should be discussed more fully here. *See* Memo., p. 8, n. 5. In 2013, when the Land Board was holding hearings to discuss the conveyance of the roads and common areas to PLCSOA, SGNA felt it was perfectly appropriate for the Land Board to convey outright, Community Beach and nearby roads to SGNA, without holding an auction, and without compensation, as set forth by its attorney's letter to the Land Board. Vega Aff., Resp't 0292-0297.

Perhaps most telling is this statement to the Land Board by SGNA's attorney:

The market value of the State Endowment Lots, within the SGNA boundary, will be protected and enhanced by being in a small, locally-controlled association. SGNA has filed its Articles of Incorporation with the Secretary of State and is capable of performing the functions the State requires for enhancing and protecting the value and attractiveness of the State Endowment's lease lots within its neighborhood.

Vega Aff., Resp't 0293 (page 2 of September 23, 2013 letter from Jay Gustavsen).

In other words, Mr. Gustavsen was arguing that by conveying Community Beach and nearby roads to a homeowner's association (*i.e.* SGNA), the value of the surrounding cottage sites would be increased. Presumably, in 2013, SGNA thought this was a perfectly acceptable solution, and that it was in accordance with the Land Board's constitutional and statutory duties to convey this land directly to SGNA, without holding an auction, and without compensation. SGNA is now singing a completely different tune and should not now be heard arguing the exact opposite of its previous stance, five years too late.

C. <u>SGNA's Failure to Join Indispensable Parties and Laches Bar its Motion for Summary Judgment.</u>

As set forth fully in PLCSOA and WWBDA's Memorandum in Support of Motion for Summary Judgment, PLCSOA is now the titled owner of all the roads and common areas within the Subdivision. WWBDA has been leased the littoral rights to Community Beach, and in reliance thereon, installed a community dock. Additionally, many cottage sites have been auctioned off for higher prices in reliance of the Deeds. In other words, many vested interests have intervened in the five years since the Deeds were issued. If SGNA's Petition were allowed to proceed, all of the cottage site owners' vested interests would be affected by an adverse ruling here, without any ability to defend these interests. These indispensable parties would have to be joined for any such result, which is simply one more reason to deny SGNA's Motion for Summary Judgment and dismiss its Petition.

Additionally, SGNA has known of, and actually participated in, the Land Board's hearings on this issue since 2013, and has been fighting WWBDA's dock in various forums since 2017. What it has not done, is seek to void the Deeds during that time.² Having sat on its hands for nearly five years prior to bringing its Petition, SGNA should not allowed to seek relief which would greatly prejudice PLCSOA,

² In fact, SGNA members did attempt to amend their complaint in previous litigation to include a count to invalidate the Deeds, however, they withdrew this motion based upon their own perception that they lacked standing to do so. Soper Aff., Exh. D, pp. 4-5 (Judge Scott's Memo. Dec. and Order in *Johnson v. Payette Lakes Cottage Sites Owners Association, Inc.*, Valley County Case No. CV-2017-204).

WWBDA, and all other cottage site owners who purchased at auction in reliance of the Deeds. SGNA's Motion should be denied and its Petition dismissed.

III. CONCLUSION

SGNA's motion for summary judgment be denied as a matter of law, due to lack of subject matter jurisdiction, lack of authority by the Land Board, and lack of standing, and its Petition dismissed.

MARK D. PERISON, P.A.

DATED: June 14, 2019.

Tricia K. Soper – Of the Firm

Attorneys for Intervenor/Respondents,

PLCSOA and WWBDA

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2019, I caused to be served a true and correct copy of the foregoing, by the method indicated, and addressed to the following:

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